No. 20,508

In the United States Court of Appeals for the Ninth Circuit

MASTER TRANSMISSION REBUILDING CORPORATION & MASTER PARTS, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW, AND ON CROSS-PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of Master Transmission Rebuilding Corporation & Master Parts, Inc. (herein called "petitioner" or "Company") to review and set aside an order of the National Labor Relations Board (R. 49-59) [1] issued

[1] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" and "PX" are to the General Counsel's and petitioner's exhibits. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

against petitioner on October 28, 1965, after proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[2] In its answer, the Board has cross-petitioned for enforcement of its order.

The Board's decision and order are reported at 155 NLRB No. 35. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Fresno, California, where petitioner is engaged in the business of rebuilding automotive transmissions.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

In sum, the Board found that the Company sought to frustrate an organizational campaign among its employees by engaging in practices violative of Section 8(a)(1), (2) and (3); that a majority of employees, nevertheless, effectively designated the Union[3] as their bargaining agent; and that the Company thereafter violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union upon request because the refusal was motivated by a desire to gain time within which to dissipate the Union's majority status. The evidence upon which the Board's findings are based is summarized below.

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[2] The pertinent provisions of the Act are set forth in the Appendix.

[3] International Association of Machinists, AFL-CIO, District Lodge No. 87.

A. *The employees select the Union as their bargaining agent.*

In early January, 1964,[4] the Union began an organizing campaign among petitioner's employees by distributing literature and authorization cards to a number of employees during their lunch period (R. 24; Tr. 141-144). This activity was observed by the Company's General Manager, Hugh E. MacGuinigie, and its Plant Superintendent, Robert W. Lawley (*Ibid.*). During the following two weeks, employee Dale Chevoya collected from 15 of the Company's 20 employees signed authorization cards designating the Union as their collective bargaining representative (R. 24; Tr. 8-9, 13-16, 143-146; GCX 2-16). The cards were then given to a representative of the Union. Thereupon, on January 22, the Union sent a letter by certified mail to petitioner—addressed to the attention of its president, Frank Rowland—notifying it that the Union represented a majority of the Company's employees and requesting a meeting "at the earliest possible date for the purpose of negotiating and consummating a collective bargaining agreement" (R. 24; GCX 17-A). This letter was received by the Company on January 27, but it was not opened and read until February 5, when Rowland returned to the plant from a trip (R. 24-25; Tr. 339-401, GCX 17-B).

B. *The Company reacts to the Union's organizing campaign.*

On January 27, the date the Company received the Union's bargaining demand, employee Chevoya was called to the office of General Manager MacGuinigie

[4] All dates herein refer to 1964.

where he was questioned about the employees' union activities. Also present at the meeting were Plant Superintendent Lawley and Shop Foreman Robert N. Young. MacGuinigie asked Chevoya whether he was the ringleader of the Union adherents and told him that President Rowland was opposed to having a union in the plant. In addition, he threatened that the plant might be moved or closed if it were unionized (R. 31-32, 49; Tr. 146-147, 155-159, 343-348, 378-380). On or about this same day, Superintendent Lawley also interrogated employee Charles Napier about his feelings toward the Union (R. 32; Tr. 75-77). Lawley told him that he and Chevoya were considered to be the ringleaders of the Union, and warned Napier that any employee caught talking about the Union would be discharged. Finally, he told Napier that the Company would move the plant rather than allow it to be organized (R. 49-50; Tr. 76).

Having received no response from the Company to its January 22 request for recognition and bargaining, the Union filed a representation petition with the Board on February 4 (PX 1-A).[5] The following day, Rowland found in his mail the Union's request for recognition and a letter from the Board's Regional Office explaining that a representation petition had been filed as a result of the Company's failure to reply

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[5] At about the same time, the Union sent the Company a letter complaining about certain recent events at the plant which, in the Union's view, were "not in keeping [with] harmonious relations." Specifically, the Union mentioned the discharge of two employees. The Union's letter asked for a prompt meeting to discuss the matter. (GCX 18).

to the request (R. 25; Tr. 399-401). Rowland then spoke to Plant Superintendent Lawley, who confirmed the Union's advent (Tr. 401-402).

As a result, Rowland called a meeting of all employees that afternoon (February 5). Visibly angered, he denounced them for engaging in union activity "behind his back," and he emphatically stated his opposition to the unionization of his plant (R. 33; Tr. 39, 84, 266-267, 403, 426-427). He remarked that since the employees wanted union conditions, he was instituting an immediate cut in their workweek to 40 hours, thereby depriving them of 6½ hours of overtime (R. 52, 33; Tr. 78, 40, 171, 403, 424-425, GCX 22, p. 3). Henceforth, he informed them, they were prohibited from discussing Union matters "on my time" (R. 51, n. 1, 27; Tr. 79, 403, 408).[6]

The following day, Rowland posted a notice setting forth a new Company policy that any employee tardy for work would be sent home for the entire day. Anyone tardy three times would be automatically discharged (R. 51, n. 1; Tr. 172-173, 408-409). Believing that the notice was directed at him, employee Chevoya spoke to Rowland about the matter on February 7 (Tr. 173). During the six month period preceding this notice, Chevoya had been late to work on many occasions, although he had never before been warned by management about his tardiness (Tr. 177-178). Rowland acknowledged that the notice had been intended primarily for Chevoya and employees Paul

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[6] Employees had 2 break periods during the working day and were paid by the Company for this time (Tr. 79).

Cron and Charles Napier (Tr. 175, 415). Chevoya admitted to Rowland that he had signed a Union card, and apologized for getting "mixed up with" the Union (Tr. 174). He also informed Rowland that 90% of the employees had signed authorization cards (Tr. 482-483). At Chevoya's request, Rowland then had the notice removed; as Rowland explained at the Board hearing, "I think it had already achieved its purpose" (Tr. 479).

At about this time, Rowland called employee Harold Anderson to his office and asked Anderson if he had had anything to do with the Union and if he had signed an authorization card (R. 50-51, 30; Tr. 42-43). Anderson falsely answered in the negative; at the Board hearing, Anderson explained "I was afraid I would lose my job if he found out" (Tr. 44).

On February 6, Rowland consulted an attorney (R. 28, 53; Tr. 405-409, 451-452). That same day, the attorney sent the Union a letter replying to its previous complaint about plant conditions (*supra,* p. 4, n. 5). The letter concluded with a reference to the Union's representation petition and an assurance that the Company would assent to an election. The letter did not, however, refer to the Union's claim of a majority status and demand for recognition and bargaining.[7]

On February 7, Rowland called another general meeting of the employees (R. 28, 53, n. 3; Tr. 406, 431),

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[7] On February 11, the Union replied by mail, advising the attorney that the Union had, by its initial letter to the Company, "very clearly stated our position regarding representation" (GCX 20). Apparently, the attorney never responded to this February 11 letter.

and announced that he had been to an attorney, that his attorney had informed him of his rights, and that he knew what he could and could not do, what he could and could not say (Tr. 407, 411, 483).

Rowland stated that he would "not fight an election . . . [but] would consent to it . . . and that the employees "should vote the way they felt" (Tr 406-407). At the same time, he repeatedly told the employees that he "did not want his shop to be union" (Tr. 407, 483). In addition, Rowland announced that he was restoring a portion of the overtime hours previously cut (R. 53, n. 3, 28; Tr. 407, 432).[8] After some questions by employees, the meeting was terminated.

C. *The Board conducts an election and the Company sponsors the formation of an employee committee.*

On February 24, a Board election was conducted at which 6 votes were cast for the Union and 12 against.[9] On the day after the election, Rowland called a special meeting of the employees to thank them for their vote against the Union (R. 51-52, 30-31; Tr. 411). He told them that he wanted them to select a three-man Employee Committee, to be elected by secret ballot, to present suggestions to him for the improvement of

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[8] At the Board hearing, Rowland explained that he decided to reinstate the overtime because its reduction constituted "poor timing with this union business coming up" (Tr. 432). Not all of the overtime was reinstated, however, because, as Rowland testified, some of the overtime would be uneconomical (Tr. 433-434).

[9] Upon the Union's objections, however, the Board's Regional Director conducted an investigation, found that the employer had engaged in conduct rendering impossible "a free and untrammeled choice" by employees, and issued an order in September setting aside the election as a nullity (GCX 21-D).

production and morale (R. 51, 29-30, 35; Tr. 506, 412, GCX 22 p. 5). Rowland explained that the Committee could bring any problem to him that might arise, except for wages, and he promised to donate the proceeds of the Company's vending machines for whatever use the employees desired (R. 51; Tr. 506-508, 412, GCX 22 p. 5). Pursuant to Rowland's directions, the Committee was chosen.

At the instance of the Committee, Rowland installed a new and more efficient lighting system in the employees' work area (R. 51, 29-30, 35; Tr. 413, 408). He agreed to assume the responsibility and cost of repairing certain employee tools (R. 51; Tr. 413). Again, at the suggestion of the Committee, he promised, if he found it feasible, to establish a loan fund for employees (Tr. 508-509, CGX 22 p. 5). Additional "dunk tanks" (tanks containing a solvent to remove grease) were installed at the Committee's request (R. 51, 35; Tr. 414), Finally, the Committee arranged for an employee party from the proceeds of the vending machines (R. 15; Tr. 413).

II. The Board's Conclusions and Order

The Board concluded that the Company had violated Section 8(a)(1) by subjecting employees Chevoya, Anderson, and Napier to coercive interrogation, by threatening to move its plant and take other reprisals against employees if they engaged in union activities, and by prohibiting union discussions on employees' nonworking time. The Board also concluded that the Company violated Section 8(a)(3) and (1) by reducing the hours of employment at its plant because the

employees had engaged in union activity and violated Section 8(a)(2) by initiating the formation of a labor organization—i.e., the Employees Committee—and by assisting and supporting that organization. Finally, the Board concluded that the Company's refusal to recognize and bargain with the Union, on and after February 5, violated Section 8(a)(5) and (1); in the Board's view, the Company's insistence upon an election was designed to gain time in which to undermine the Union's majority status and not because of any good faith doubt about that status. (R. 49-55).

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from interfering with employee rights in any other manner. Affirmatively, the Company is required to withdraw recognition from the Employees Committee, to bargain collectively with the Union, and to post appropriate notices.[10] (R. 57-59).

ARGUMENT

I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Company Interfered With, Restrained, and Coerced Its Employees in the Exercise of Their Statutory Rights, Thereby Violating Section 8(a)(1) of the Act.

Petitioner does not challenge the Board's factual findings which establish that employees Chevoya, Napier and Anderson were interrogated by management

[10] The Board also stated that its remedial order would contain a direction that the Company bargain with the Union even if no violation of Section 8(a)(5) had been established. In the Board's view, a bargaining order would be warranted here to cure the individual employee defections from the Union caused by the Company's other unfair practices (R. 55).

about their union activity, accused of being "ringleaders," warned that employees who discussed the Union would be discharged, and admonished that President Rowland would move the plant rather than allow it to be organized That such conduct violates Section 8(a)(1) is too well settled to require further discussion.[11]

Petitioner, likewise, seems to concede that President Rowland violated the Act by telling employees in his February 5 speech that their overtime hours were being reduced; it is plain enough that this reduction in working time was unlawful since it was intended to serve as a reprisal against union activity (*supra,* p. 5). *N.L.R.B.* v. *Geigy Company,* 211 F. 2d 553, 557 (C.A. 9). Indeed, petitioner's sole defense to the Section 8(a)(1) findings apparently boils down to this: the Board should not have found any violations besides those already found by the Trial Examiner. In petitioner's view, the Board "abused its discretion" (Br. 29) by "disregarding" the Trial Examiner's credibility resolutions and factual findings in order to find additional violations besides those mentioned above. But petitioner's argument rests on an inaccurate description of the proceedings below.

In this case, the Court may enforce all the Board's Section 8(a)(1) findings without risk of overlooking or slighting the Examiner's findings. For, as we now show, the Board did not reverse any of the Examiner's

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[11] *N.L.R.B.* v. *Security Plating Company, Inc.,* 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Sebastopol Apple Growers Union,* 269 F. 2d 705, 707-708 (C.A. 9); *N.L.R.B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261-262 (C.A. 9), cert. denied 348 U.S. 829; *N.L.R.B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 904-904 (C.A. 9).

credibility resolutions or findings of fact in adding to the list of Section 8(a)(1) violations.

Thus, the Examiner would have dismissed the complaint allegations relating to Rowland's February 7 posting of a notice announcing penalties for tardiness (R. 30-31). In the Examiner's view, the notice was not posted for any ulterior purpose, but merely to get the employees promptly to work. The Board, however, viewing the same facts as the Examiner, concluded that the notice was intended to serve as a reprisal against the employees for engaging in union activity (R. 51, n. 1). The Board's judgment has adequate support: Chevoya and other employees had been late to work on many past occasions (Tr. 177-178), but the Company had condoned the practice for years. Only after Rowland learned of the Union's advent were disciplinary measures taken, and then the notice was posted at virtually the identical time that the Company was depriving employees of other benefits manifestly for anti-union reasons. Hence, the Board's decision on this point is not only in accord with judicial precedent,[12] but it differs with the Examiner's only in respect to what inferences may properly be drawn from undisputed facts. In these circumstances, the fact that the Examiner saw the witnesses testify counts for little, and the disagreement between the Examiner and the Board hardly detracts from the substantiality of support for the Board's result. See cases cited *infra* pp. 22-23.

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[12] See *Revere Camera Co.* v. *N.L.R.B.*, 304 F. 2d 162, 165 (C.A. 7); *N.L.R.B.* v. *Lexington Chair Co.*, — F. 2d —, 62 LRRM 2273, 2279 (C.A. 4); *N.L.R.B.* v. *Hill & Hill Truck Lines, Inc.*, 266 F. 2d 883, 885 (C.A. 5).

All the other Section 8(a)(1) violations added by the Board involve situations where the Examiner had already made findings of fact which would warrant a determination that the Act had been violated. Without modifying those findings, the Board simply supplied the missing, appropriate, legal conclusion, i.e., that the conduct was unlawful under the Act. Thus, it is undisputed that Rowland's admonition to employees prohibiting their discussion of union matters on Company time applied even to the employees' break time, when the employees were not actually working. The Examiner did not expressly find this prohibition to be unlawful, but upon exceptions by the General Counsel, the Board supplied the appropriate conclusion of law.[13] Petitioner shows no reason why the Examiner's oversight should not have been corrected. The same applies to Rowland's undenied interrogation of employee Anderson (*supra,* p. 6) which the Board deemed coercive and unlawful, and Superintendent Lawley's threat of plant closing directed to employee Napier (*supra*, p. 4).[14]

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[13] *N.L.R.B.* v. *Mira-Pak Inc.,* 354 F. 2d 525, 527 (C.A. 5); *Stackhouse Oldsmobile, Inc.* v. *N.L.R.B.,* 330 F. 2d 559, 561-62 (C.A. 6); *N.L.R.B.* v. *Essex Wire Corp.,* 245 F. 2d 589, 593 (C.A. 9); and see *Republic Aviation Co.* v. *N.L.R.B.,* 324 U.S. 793.

[14] Petitioner correctly points out that the Board will not usually set aside an election because of improper conduct occurring prior to the filing of the representation petition (Br. 23-24). See *Goodyear Tire & Rubber Co.,* 138 NLRB 59. But there is nothing in the record to support petitioner's suggestion that the *Goodyear* policy was overlooked here. The Regional Director focussed on President Rowland's admitted conduct of February 5 and 7 in concluding that a fair election had been precluded (G.C. Exh. 21-D). The election petition had been previously filed (*supra*, p. 4).

II. Substantial Evidence on the Whole Record Supports the Board's Finding That the Company Violated Section 8(a)(3) of the Act by Announcing a Reduction in Working Hours on February 5.

It is clear and undisputed that Company President Rowland told the employees on February 5 that since they wanted "union conditions" he was giving them a "union workweek", and thereby reducing their hours of employment by 6½ hours per week (R. 33). The Trial Examiner found that this was "coercive and discriminatory conduct under the Act," and the Board agreed (R. 52). Petitioner concedes, as it must,[15] that this conduct was violative of the Act (Br. 27) but suggests that the violation was cured or mooted because the Company later retreated and restored most of the lost work. This suggestion clearly lacks merit.

First of all, it is settled that a discontinuation of unlawful conduct poses no bar to enforcement of a Board order. *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567; *Pacific Coast Ass'n. of Pulp & Paper Mfrs.* v. *N.L.R.B.*, 304 F. 2d 760, 765 (C.A. 9); *N.L.R.B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 208 (C.A. 9). The fact that the order reducing overtime was rescinded before any employees actually suffered wage losses thereby was taken into account by the Board in its drafting of a remedial order, since there is no backpay requirement here. On the other hand, the circumstances of this case make it plain that

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[15] *Trumbull Asphalt of Delaware* v. *N.L.R.B.*, 314 F. 2d 382, 383 (C.A. 7), cert. denied 374 U.S. 808; *N.L.R.B.* v. *Guild Industries Mfg. Corp.*, 321 F. 2d 108, 110-111 (C.A. 5); *N.L.R.B.* v. *Unified Industries, Inc.*, 273 F. 2d 431, 432 (C.A. 6).

the Company's restoration of overtime was, of itself, inadequate to dispel the coercive and discriminatory impression already created. Thus, in restoring the overtime, the Company did not make it clear to employees that their future participation in union activity would be immune from reprisal. Indeed, the restoration was only partial—2½ hours of overtime remained lost to employees—and while the Company indicated at the time of restoration that the "union business" had been a reason for the initial reduction, the Company did not make it clear to employees that the remaining loss of 2½ hours was due exclusively to business considerations. Likewise, in restoring part of the overtime lost, Rowland never disavowed his supervisors' prior threats of plant closing and other forms of reprisal against union activity. Accordingly, the Board could properly conclude, as it did, that this was not a case in which there had been a clear and timely disclaimer sufficient to expunge the unlawful effects of prior management conduct. See *A.P. Green Fire Brick Co.* v. *N.L.R.B.*, 326 F. 2d 910, 914 (C.A. 8); *N.L.R.B.* v. *Solo Cup Co.*, 237 F. 2d 521, 524, (C.A. 8); *Time-O-Matic Inc.* v. *N.L.R.B.*, 264 F. 2d 96, 99-100 (C.A. 7); *N.L.R.B.* v. *Armstrong Tire & Rubber Co.*, 228 F.2d 159, 161 (C.A. 5).[16]

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[16] Petitioner also challenges the Board's Section 8(a)(3) finding by reference to the fact that the unfair labor practice charge here alleged that the reduction of overtime was a violation of Section 8(a)(1) but not Section 8(a)(3). It verges on the frivolous, we submit, to suggest that the Board is thereby precluded from finding a Section 8(a)(3) violation. The function of a charge is to set the Board's investigation in motion, not to confine the Board's inquiry to the precise particularizations as framed by the private complaining party. *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 307; *N.L.R.B.*

III. Substantial Evidence on the Whole Record Supports the Board's Finding That Petitioner Violated Section 8(a)(2) and (1) of the Act by Dominating and Interfering With the Formation and Administration of an Employees' Committee.

The day after the Board election, President Rowland called a special meeting of employees to thank them for their vote against the Union; at this time he directed them to select a committee to represent the employees with respect to "any problem that might come up" except wages (Tr. 88, 507). Employees were to channel their individual grievances through this committee, whose financial stability was assured by Rowland's donation of the proceeds of various vending machines in the plant (*supra*, p. 8).

Petitioner does not seriously dispute that its initiation and support of the Committee would constitute a clear violation of Section 8(a)(2) and (1) if the Board properly found this Committee to be a "labor organization" within the meaning of Section 2(5) of the Act.[17] But in petitioner's view, the Board should not have found the Employee Committee to be a labor organization because it was merely a "social" organization, or

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v. *Waterfront Employers*, 211 F. 2d 946, 955-956; *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2). Beside, petitioner fails to explain how it has been prejudiced by the fact that the Board found a Section 8(a)(3) violation: the same cease and desist order would be appropriate even if the violation found had been classified under Section 8(a)(1).

[17] See, e.g., *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 597-600; *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176, 180-181 (C.A. 2); *N.L.R.B.* v. *Koehler's Wholesale Restaurant Supply Co.*, 328 F. 2d 770, 771 (C.A. 7); *N.L.R.B.* v. *Thompson-Ramo-Wooldridge, Inc.*, 305 F. 2d 807, 810 (C.A. 7).

"suggestion committee" (Br. 31). The Board's decision, we submit, is correct.

Section 2(5) of the Act defines the term "labor organization" to include "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." This definition in the amended Act was carried over without change from the original Act. As pointed out in the Report of the Senate Committee which considered the identical provision in the original Act, the term "labor organization" was deliberately phrased "very broadly in order that the independence of action guaranteed by Section 7 of the bill and protected by Section 8 shall extend to all organizations of employees that deal with employers." Report No. 573 on S. 1958, 74th Cong., 1st Sess., p. 7.[18]

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[18] Further illustrating this intent is the following excerpt from a memorandum prepared for the Senate Committee on Education and Labor, comparing the provisions of S. 1958 (which became law) with similar provisions in the bill proposed in the preceding Congress:

> It has been argued frequently by employers as well as by protagonists of the bill last year that an *employee representation plan or committee arrangement* is not a labor organization or a union but simply a method of contact between employers and employees. But the Act is entitled to prescribe its own definition of labor organization, for its own purposes, and it is clear that unless these plans, etc., are included in the definition, whether they merely "deal" or "adjust" or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the Act. [Emphasis supplied.] [*Memorandum of March 11, 1935*, prepared for the Senate Committee on Education and Labor, comparing S. 1958 (74th Cong., 1st

Tested by this statutory definition, the Employee Committee inaugurated by petitioner is clearly a "labor organization" All of petitioner's employees participate in it, not only by electing its members but also by presenting to it—pursuant to Company direction—their own suggestions and grievances. Moreover, the Committee exists for the purpose, at least in part, of dealing with the Company concerning grievances and working conditions. As the Board pointed out, the Committee effectively dealt with the Company on such matters as improving lighting in the plant, providing for repair of employee tools at Company expense, establishing more convenient working facilities and initiating an employee loan fund.[19] Since the Committee was thus used as a vehicle for presentation of employee grievances about working conditions, the Board was plainly entitled to characterize it as a labor organization. That it also may have served social functions does not exclude it from the coverage of Section 2(5). *N.L.R.B.* v. *Cabot Carbon Co.,* 360 U.S. 203; *American President Lines, Ltd.* v. *N.L.R.B.,* 340 F. 2d 490, 492-493 (C.A. 9); *Indiana Metal Products Corp.* v. *N.L.R.B.,* 202 F. 2d 613, 620-621 (C.A. 7); *N.L.R.B.* v. *Standard Coil Products Co.,* 224 F. 2d 465 (C.A. 1).

Petitioner challenges the Board's determination, on

Sess.) with S. 2926 (73d Cong. 2d Sess.), p. 22; reprinted in *Legislative History of the National Labor Relations Act, 1935,* G.P.O., 1949, p. 1347.]

[19] Rowland's promise to establish the loan fund was not a firm one; he acknowledged, however, that he had agreed to grant the Committee's request if further study confirmed the feasibility of such a fund (Tr. 508-509).

this aspect of the case too, by pointing out that the Trial Examiner did not view the Committee as a "labor organization" (Br. 30-32). But here again, the Board did not disturb any credibility resolutions or fact findings of the Examiner. On this aspect of the case, too, the basic disagreement between the Board and the Examiner was not over basic facts, but over the significance of those facts and the inferences to be drawn therefrom. In deciding whether a given employee organization falls within the statutory definition of a labor organization, the Examiner's opportunity to see the witnesses testify provides him with no special advantage and his adoption of a divergent view is entitled to no special weight.

IV. Substantial Evidence on the Whole Record Supports the Board's Finding That the Company Violated Section 8(a)(5) and (1) of the Act by Refusing to Bargain With the Union on Request.

Having obtained signed authorization cards from 15 of the Company's 20 employees, the Union notified the Company that it was the majority representative and demanded recognition and bargaining. The Company acknowledges learning of this demand of February 5. Under settled principles, the Company was thereupon required to recognize and bargain with the Union; insistence upon a Board election instead would violate Section 8(a)(5) and (1) unless the Company had a good faith doubt of the Union majority status.[20] As this Court recently stated,

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[20] *N.L.R.B.* v. *Security Plating Company, Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9); cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson*

> The refusal [to bargain] may not be motivated by a desire to forestall collective bargaining and provide an opportunity to undermine the union's majority status and rid the Company of the union." *Security Plating, supra,* 356 F. 2d at 727.

The Board found, in this case, that petitioner was motivated by a "desire to gain time in which to undermine the Union's majority status" (R. 55) in its failure to respond to the Union's request for bargaining. That finding, we submit, is solidly supported by the evidence. Not only did the Company undertake no inquiry into the Union's proof of majority status, it persisted in the unlawful anti-union campaign which had begun almost as soon as it learned that the employees were attempting to organize. We have already shown that President Rowland responded to the Union request for recognition by depriving employees of overtime, prohibiting employee discussions of the Union during coffee breaks, and announcing in a coercive fashion his opposition to the Union; Company supervisors interrogated employees about the Union activity and threatened them with a plant shutdown; later, the Company directed the establishment of a labor organization to be administered under its own auspices. This is not the conduct of an employer who has a good faith doubt of a union's majority status. Cases cited *supra,* p. 18.[21]

Corp. v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468, 471-472 (C.A. 7); *N.L.R.B.* v. *Overnite Transportation Co.*, 308 F. 2d 279, 283 (C.A. 4); *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 291-292 (C.A. 4); *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2); *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied, 341 U.S. 914).

[21] Accord: *N.L.R.B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 262-

The arguments advanced here by petitioner to show a good faith doubt all fade before the facts. Thus, the Company refers to an anti-Union petition which about 12 employees signed (Br. 16-17); but it is undisputed that this evidence of a loss of majority status did not appear until after Rowland's coercive conduct on February 5. It is true that the petition was circulated by several employees who were opposed to the Union from the start. But as the Board pointed out, the Union had achieved its majority status notwithstanding the conduct of these employees. It was not until the Company President intervened on February 5 that pro-Union employees began to defect. Obviously, petitioner cannot set up as defense the defections which its own unlawful conduct has produced. *Medo Photo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687; *N.L.R.B.* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134 (C.A. 9). *N.L.R.B.* v. *Movie Star, Inc.*, 361 F. 2d 346, 351 (C.A. 5).[22]

Nor does petitioner significantly advance its case by reference to President Rowland's self-serving testimony to the effect that he never believed the Union had a majority (Br. 16). Such a belief should be supported by some rational factual basis before it can be equated

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263 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686 (C.A. 2); *Jas. H. Matthews & Co.* v. *N.L.R.B.*, 354 F. 2d 432, 439 (C.A. 8); *N.L.R.B.* v. *Elliott-Williams Co., Inc.*, 345 F. 2d 460, 463-464 (C.A. 7).

[22] Besides Rowland admitted at the unfair labor practice hearing that he knew nothing of the anti-union petition until it was mentioned in the testimony at that hearing (Tr. 417). Manifestly, therefore, that petition cannot be considered as a basis for any good faith doubt at the time of the refusal to bargain. *N.L.R.B.* v. *Kellogg's Inc.*, 347 F. 2d 219, 220 (C.A. 9).

with a good faith doubt. (Cases cited *supra*, p. 18.) In this case, Rowland never sought to justify his belief by scrutinizing the Union's evidence or by conducting a non-coercive inquiry among the employees directly. Indeed, the record shows that the only employee who discussed this matter with Rowland at the time stated that the Union had the support of 90% of the employees (*supra*, p. 6).

Finally, petitioner relies upon the facts that (1) the Union's letter requesting recognition did not contain an express offer to prove its majority status and (2) the Union subsequently filed a petition for an election. But this Court has already squarely ruled that such matters do not raise a good faith doubt. *Security Plating Company, supra,* 356 F. 2d at 727-729.[23]

In finding petitioner's conduct violative of Section 8(a)(5) and (1), the Board again reversed the Examiner. Again, petitioner relies on the Examiner's Report here to defend against the Board's order (Br. 16, 20-21, 28-29).

It is true, of course, that support for the Board's decision may be weakened when the Examiner has drawn a conclusion different from the Board's. *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 496. But it is the Board's decision, not the Examiner's which is before this Court for review. And the ground rules of judicial review are the same whether the Board has agreed or disagreed with the Examiner. In either

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[23] Accord: *N.L.R.B.* v. *Whitelight Product Division*, 298 F. 2d 12, 14 (C.A. 1), cert. denied, 369 U.S. 887; *N.L.R.B.* v. *Sunrise Lumber & Trim*, 241 F. 2d 620, 624 (C.A. 2), cert. denied, 355 U.S. 818; *N.L.R.B.* v. *Trimfit of California*, 211 F. 2d 206, 210 (C.A. 9).

situation, the question is whether substantial evidence supports the Board's result. *N.L.R.B.* v. *Waterfront Employers,* 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B.* v. *Dell,* 283 F. 2d 733, 735 (C.A. 5); *Utica Observer-Dispatch, Inc.* v. *N.L.R.B.,* 229 F. 2d 575, 577 (C.A. 2), cert. denied, 351 U.S. 988; *N.L.R.B.* v. *Pyne Molding Corp.,* 226 F. 2d 818, 819 (C.A. 2); *N.L.R.B.* v. *Thomason Plywood Corp.,* 222 F. 2d 364 (C.A. 4). In applying this test, the Court is obliged to accord the Examiner's conclusions no more weight than their inherent cogency warrants. In this case, we submit, the Examiner's decision rested, to a great extent, upon erroneous legal principles; accordingly, rejection of his conclusion does not significantly detract from the support for the Board's case.

Thus, the Trial Examiner took the view that the Union's filing of a petition relieved the Company of its obligation to honor the prior request for bargaining (R. 33). We have already shown that this is not the law (*supra,* p. 21). Further, the Examiner thought that the signature of the anti-union petition by several employees on February constituted an effective withdrawal of their authorization cards (R. 34). The Board, we have shown, properly ruled otherwise (*supra,* p. 20). Finally, the Examiner was persuaded that Rowland's conduct on February 7 constituted a sufficient retraction of the earlier coercive events (R. 34). This too, in the Board's judgment, was error. With the foregoing grounds for the Examiner's conclusion removed, little remains to support it. Rowland's own self-serving testimony, asserting a good

faith doubt, contrasts vividly against all the other evidence in the record. The Board could therefore properly reverse the Trial Examiner and draw a contrary inference from the facts. *N.L.R.B.* v. *Pyne Molding Corp.,* 226 F.2d 818, 819, 821 (C.A. 2); *N.L.R.B.* v. *Camco, Inc.,* 340 F.2d 803, 808 (C.A. 5), cert. denied, 382 U.S. 926; *N.L.R.B* v. *Waterfront Employers,* 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B.* v. *Eclipse Lumber Co.,* 199 F. 2d 684, 686 (C.A. 9); *N.L.R.B.* v. *Fitzgerald Mills Corp.,* 313 F. 2d 260, 268 (C.A. 2).[24]

V. The Board's Order Is Valid and Proper

A. *The Union did not "waive" its right to a bargaining order by participating in the Board election.*

The Board is clearly entitled to compel an employer to bargain with a union in order to remedy the kind of unlawful conduct involved herein, even where the union has subsequently lost its majority status because of employer unfair practices. *N.L.R.B.* v. *Andrew Jergens Co.,* 175 F.2d 130, 135, cert. denied, 338 U.S. 827, rehearing denied, 338 U.S. 882; *Sakrete of Northern California* v. *N.L.R.B.,* 332 F. 2d 902, 909 (C.A. 9) and cases cited; *Gotham Shoe, supra; Movie Star, Inc., supra.* But petitioner argues that no bargaining order should have issued here because the Union "waived" its rights to such an order by participating in a Board

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[24] We need not linger over petitioner's assertion that the "record discloses not one single act on the 5th that can be interpreted as a refusal to bargain" (Br. 15). It is undisputed that President Rowland on this date announced that he was opposed to the Union and subjected his employees to manifestly anti-Union reprisals; thereafter, he never replied to the Union's request for recognition. The Board could properly construe this conduct as a refusal to bargain.

election. In petitioner's view, the Union should have been compelled to make a binding choice between the two procedures available—a representation election or an unfair labor practice hearing—to establish its status. The two procedures, in petitioner's view, are "mutually inconsistent" (Br. 37).[25]

The short answer to all this derives from *Bernel Foam Products Co.*, 146 NLRB 1277. There, the Board rejected the foregoing arguments and concluded that an invalid election should not preclude a union from resort to an unfair labor practice hearing; at this writing, every court of appeals which has had occasion to pass upon the issue has upheld the Board. *N.L.R.B.* v. *S.N.C. Mfg. Co.*, 352 F. 2d 361, cert. denied, 382 U.S. 902; *N.L.R.B.* v. *Frank C. Varney Co., Inc.*, 359 F.2d 774, 775-776 (C.A. 3); *Amalgamated Clothing Workers of American (Edro Corp.)* v. *N.L.R.B.*, 345 F.2d 264 (C.A. 2); *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2); *Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128, 138-139 (C.A. 8), cert. denied, 382 U.S. 904. As these cases squarely hold, the Board is entitled to issue a bargaining order, after Section 8(a)(5) proceedings, to remedy a situation where a union has lost both its majority status and an election because of improper employer conduct.

A more thorough answer requires analysis of the *Bernel Foam* decision itself, and of *Aiello Dairy*

[25] Petitioner's alternative suggestion that the 1947 amendments reveal a Congressional determination to require a secret ballot election as the exclusive means for establishing a union's status is clearly erroneous. Alternative modes of proof, before and after 1947, have been uniformly accepted. *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 71-72; cases cited *supra*, pp. 18-20.

Farms, 110 NLRB 1365. Prior to the decision in *Aiello,* the Board had repeatedly held—as it did in the instant case—that a union's participation in an election did not constitute a waiver of its right to maintain a refusal to bargain charge based upon an employer's pre-election conduct. The courts of appeals—including this Court—uniformly upheld the Board's power to issue a bargaining order in these circumstances.[26] In *Aiello,* however, the Board adopted the rule here urged by petitioner. Now, after some 10 years of operating under *Aiello,* the Board has concluded upon further analysis and in light of its experience that *Aiello* should be overruled and that the former practice should be restored. *Bernel Foam, supra.*

First, it is erroneous to view a representation election and an unfair labor practice order as "mutually inconsistent" remedies. Technically, it is true, a representation petition rests on the premise that there is a question concerning representation to be resolved, while a Section 8(a)(5) charge is founded upon the contrary assumption that no such question exists because the union is the exclusive bargaining representative; but on closer analysis it become apparent that these proceedings are distinct, not inconsistent. Although, in filing a representation petition, the union asserts as a

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[26] *N.L.R.B.* v. *Howell Chevrolet Co.,* 204 F. 2d 79, 86 (C.A. 9); *N.L.R.B.* v. *Stow Mfg. Co.,* 217 F. 2d 900 (C.A. 2), cert. denied 348 U.S. 964; *N.L.R.B.* v. *Model Mill Co.,* 210 F. 2d 829 (C.A. 6); *N.L.R.B.* v. *Armco Drainage & Metal Products Co.,* 220 F. 2d 573 (C.A. 6), cert. denied, 350 U.S. 838; *N.L.R.B.* v. *Southeastern Rubber Mfg. Co., Inc.,* 213 F. 2d 11 (C.A. 5); see also, *Joy Silk Mills, Inc.* v. *N.L.R.B.,* 185 F. 2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914; *N.L.R.B.* v. *Caldarera,* 209 F. 2d 265 (C.A. 8).

formal matter that a question concerning representation exists, the union has not, as a practical matter, altered its position that it represents the employees and is entitled to recognition. Rather, it is stating *the employer's assertion* of such a question: indeed it is the employer's refusal to bargain itself which generates the election procedure.

Further, where, as here, the employer engaged in unlawful conduct after the union filed its petition, the so-called "choice" which the union is forced to make under *Aiello,* between going to an election or filing a Section 8(a)(5) charge, is an unsatisfactory one with respect to both practical industrial realities and the statutory scheme. An election is a relatively swift and inexpensive way for the union to establish its majority status, but the union must be prepared to take the risk that employer conduct may preclude a fair election. The severity of this risk is amply demonstrated by the large number of cases in which elections are set aside on the basis of unlawful conduct by the employer during the period between the filing of the petition and the conduct of the election.[27] A Section 8(a)(5) proceeding, on the other hand, removes this uncertainty because the union need not be concerned about the effect which an employer's unlawful conduct may have on its preexisting majority status. Nevertheless, the representation route offers two distinct advantages which, as a practical matter, are likely to weigh heavily in a union's decision. First, and perhaps most appealing,

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[27] *The Ideal Electric and Manufacturing Company,* 134 NLRB 1275.

it is considerably less time-consuming and costly than an unfair labor practice proceeding, and enables employees to obtain the representation they desire in relatively short order. A second advantage is that the certified union enjoys special and highly desirable benefits not applicable to other lawfully recognized unions.[28] Frequently, therefore, a union may find itself compelled to proceed to an election because of these considerations, irrespective of any fear that its majority status may have been dissipated by employer interference.[29] In short, as the Board has noted, the union's "choice" is a "difficult and rather dubious" one *(Bernel Foam, supra)*.

As the irrevocable "choice" which confronts the union was created, not by its own acts, but by the employer's unlawful conduct, the harshness of the *Aiello* rule is readily apparent. Hence, the Board has concluded that

> "there is no warrant for imposing upon the Union * * * an irrevocable option as to the method it will pursue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct. The fact that in an election a vote favorable to the Union may

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[28] For example, a Board certification normally protects the union's representative status for a minimum of one year, despite actual loss of majority. See *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. Such certification also accords protection to the union, under Section 8(b)(4)(C) and 8(b)(7) of the Act, against certain organizational pressures from rival unions.

[29] See *Note*, 68 Harv. L. Rev. 1470-1472 (1955).

> obviate for it the necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring that the Union forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's [majority] status" *(Bernel Foam, supra).*

The *Aiello* "election of remedies" concept is deficient for still another reason. Where, after a petition is filed, employer interference precludes the exercise of employees' free choice, the election is a nullity and must be set aside. In these circumstances, it is wholly illusory to refer to the election process as an effective alternative remedy to a refusal-to-bargain proceeding. As the Board pointed out in *Bernel Foam:*

> "[T]o hold * * * that by participating initially in an ultimately void election the Union irrevocably committed itself to the representation proceeding and, therefore, may seek a remedy only in another election, overlooks the fact that an election is not a remedy either in statutory concept or in reality. On the contrary, experience has demonstrated that a vast majority of the re-run elections' results favor the party which interfered with the original election. This clearly demonstrates the lingering effect of unacceptable electioneering conduct. Thus, in a majority of the cases another election can hardly be said to be an adequate remedy

for the employer's unlawful refusal to recognize the employees' designated majority representative which was followed by conduct which interfered with the employees' freedom of choice."[30]

Finally, general policy considerations which come into play in the administration of the Act strongly militate against the *Aiello* rule. For *Aiello* flies in the face of the fundamental concept that the wrongdoer should not be permitted to profit from his own misdeeds at the expense of the wronged party. *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, 232; *Franks Bros. Co.* v. *N.L.R.B.,* 321 U.S. 702; *A.P.W. Products Co.,* 137 NLRB 25, 29-30, enf'd 316 F. 2d 899, 904-906 (C.A. 2). To ignore the employer's unlawful conduct in first refusing to bargain and then engaging in pre-election interference with the employees' freedom of choice, as the *Aiello* rule does, is incompatible with the statutory mandate. "Indeed, it lends the Board's procedures as a tool to thwart the statutory rights of the majority of the employees involved and subverts the very purpose of the Act. It is to be hoped that an approach which denies an employer any benefit from its unlawful refusal to bargain will remove the motive for demanding unnecessary elections and diminish efforts

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[30] See also, Pollitt, "NLRB Re-Run Elections: A Study," 41 N. Car. L. Rev. 209-224. On the basis of an analysis of 212 "employer caused" re-run elections conducted under Labor Board supervision during a recent 33-month interval, the author concluded that the objecting union only won 30 percent of such re-run election (*id.* at 212). By contrast, unions generally win about 60 percent of the Board's elections. *Twenty-Eighth Annual Report, NLRB,* p. 18 (G.P.O. 1964).

to undermine the will of the employees * * *." *(Bernel Foam, supra).*

The "election of remedies" rule set forth in *Aiello* does not, of course, rest upon a statutory command. Rather, the ultimate issue presented is whether the Board properly exercised its discretion in fashioning a remedy where the employer has unlawfully refused to recognize the union *and* has unlawfully interfered with an election. As the courts have repeatedly recognized, the choice of remedy and the means of determining the employees' sentiment are matters peculiarly within the Board's broad discretion. *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 351-352; *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330-331; *Joy Silk, supra,* 185 F. 2d at 741-745. Indeed, in approving a bargaining order under circumstances virtually identical to those here, the court in *Joy Silk* relied on the following language from *Franks Bros.*: "It is for the Board not the courts to determine how the effect of prior unfair labor practices may be expunged. * * * That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. * * * That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustration of the Act seems too plain for anything but statement."

The considerations outlined above fully justified the Board, we submit, in reversing *Aiello* and reverting to its former practice. But it should be emphasized that, under the limited scope of judicial review here applicable, it is enough that the Board's decision lies within the scope of its statutory power and is rationally supported. For here, as in *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 347, the matter is one committed to administrative discretion; "it is not for us [the courts] to weigh these or countervailing considerations." 344 U.S. at 348. "The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *Seven-Up, supra,* 344 U.S. at 349.[31]

The propriety of applying the *Bernel Foam* doctrine retroactively was recognized in the cases cited *supra,* p. 24. It is the function of an administrative agency, as of a court, to decide the case before it in the manner that it deems proper, without necessarily being bound by the rules evolved in previous cases. *Metropolitan Life Insurance Co.* v. *N.L.R.B.,* 328 F. 2d 820, 828 (C.A. 3), vacated and remanded on other grounds, 380 U.S. 523; *Helvering* v. *Hallock,* 309 U.S. 106, 121; *Washington* v. *Dawson & Co.* (Brandeis, J., dissenting), 264 U.S. 219, 238; *N.L.R.B.* v. *A.P.W. Products Co.,* 316 F. 2d 899, 905 (C.A. 2); *Leedom* v. *IBEW,* 278 F. 2d 237, 242-244 (C.A.D.C.); *N.L.R.B.* v. *Olaa Sugar Co.,* 242

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[31] In *Seven-Up,* the Supreme Court approved a substantial change in the Board's method of computing backpay after the Board had followed a different policy for 15 years. See also, *N.L.R.B.* v. *A.P.W. Products Co.,* 316 F. 2d 899, 904-905 (C.A. 2).

F. 2d 714, 721 (C.A. 9). The case at bar is hardly a situation where it may be contended that the protection of the Act was removed from one who had relied on it (*Pedersen* v. *N.L.R.B.,* 234 F.2d (C.A. 2)); nor is it a case in which elements of "entrapment" exist (*N.L.R.B.* v. *Int'l Brotherhood of Teamsters,* 225 F. 2d 243, 348 (C.A. 8)). It would be "rather fanciful" to imagine that the Company engaged in its unfair labor practices in reliance on a past Board decision holding that the Union would have the right to resort to either a representation proceeding or an unfair labor practice proceeding, but not both. See, *A.P.W. Products Co., supra,* 316 F. 2d at 906; *N.L.R.B.* v. *Gottfried Baking Co.,* 210 F. 2d 772, 781 (C.A. 2).[32]

B. *The bargaining order should be sustained even if there is a defense to the Section 8(a)(5) violation.*

It should also be noted that the Board's remedy is premised in the alternative on the Section 8(a)(1) violations found, because the Union's loss of actual

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[32] Petitioner is correct, of course, in noting that authorization cards are not always a reliable indicator of employee sentiment. But most of the Company's statistical support for its challenge to the reliability of such cards (Br. 17-18), derives from a context where 2 or more rival unions are engaged in organizing campaigns, and where duplications are likely to occur. See *Sunbeam Corp.,* 99 NLRB 546, 550-551. Besides, the remedial problem before the Board is created by virtue of the fact that the Company has engaged in conduct which, in this case, precludes the holding of a fair election. And this record is barren of evidence indicating why, in this case, the authorization cards should not be accepted at face value. Compare *N.L.R.B.* v. *Peterson Brothers, Inc.,* 342 F. 2d 221 (C.A. 5); *Englewood Lumber Co.,* 130 NLRB 394, 395, involving evidence of an ambiguity on the face of the card or misrepresentation by the union solicitors.

majority status was clearly attributable to the employer's unfair labor practices. Accordingly, the Board concluded that effectuation of the policies and purposes of the Act required the issuance of a bargaining order herein even if there were no unlawful refusal to bargain (R. 55). The order is properly based on the Section 8(a)(1) violations alone, for among the purposes which the Board may attempt to accomplish in framing an appropriate remedy for unfair labor practices is a "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practices, *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194. Where petitioner's "illegal interference with its employees' rights did cause the union's loss of majority status," the Sixth Circuit recently stated, "it seems to be well within the NLRB's discretion to seek a remedy which would effectively restore the status quo ante. It seems most unlikely that a simple cease and desist order could be expected to accomplish this result." *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 347. Accord: *Int'l Union, United Automobile, Aerospace, etc.* v. *N.L.R.B. & Aero Corp.* — F. 2d —, 62 LRRM 2361, 2364 n. 7 (C.A.D.C.); *Local No. 152 Int'l Brotherhood of Teamsters* v. *N.L.R.B.*, 343 F. 2d 307, 309 (C.A.D.C.); *D. H. Holmes Co.* v. *N.L.R.B.*, 179 F. 2d 876, 879-880 (C.A. 5); *Summit Mining Corp.* v. *N.L.R.B.*, 260 F.2d 894, 900 (C.A. 3); *N.L.R.B.* v. *Caldarera*, 209 F. 2d 265, 268 (C.A. 8); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F. 2d 575, 591-592 (C.A. 3); *Editorial "El Imparcial," Inc.* v. *N.L.R.B.*, 278 F. 2d 184, 187 (C.A. 1).

The Board's bargaining order, of course, allows a representation election after the Company has bargained with the Union for a reasonable time. The imposition of any greater limitation—that is, a requirement that the Union first win an election before being given bargaining authority—was summarily rejected by the Supreme Court in *N.L.R.B.* v. *International Union, Progressive Mine Workers of America,* 375 U.S. 396, reversing *per curiam* in this respect 319 F. 2d 428, 437 (C.A. 7). As the Second Circuit stated in *N.L.R.B.* v. *Philamon Laboratories, Inc.,* 298 F. 2d 176, 182-183, cert. denied, 370 U.S. 919, after pointing to the unconditional bargaining orders approved in *Franks Brothers Co.* v. *N.L.R.B.,* 321 U.S. 702, and *N.L.R.B.* v. *Stow Mfg. Co., supra,* 217 F. 2d 900:

> Even without such established precedents, we would be hard pressed to reject this exercise of the Board's remedial powers. The Union lost majority status because of respondent's violations of the law. The only effective remedy left in the present case is the requiring of recognition. And, indeed, as far as future cases are concerned, a denial of power to the Board might well encourage employers to refuse to bargain, commit the ancillary violations, fight the unfair labor practice charges to the courts, and then rely upon the inevitable intervening turnover in personnel to ward off the only effective remedy remaining. In any case, we cannot say such a rationale way not be adopted by the specialized agency entrusted by Congress with the principal enforcement duties under the Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for review should be denied, and that a decree should issue enforcing the Board's order in full.

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September, 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatements of employees with or without back pay, as will effectuate the policies of this Act: * * *

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(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been

urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

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(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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